



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case No D1118/12

In the matter between:

REDIS CONSTRUCTION AFRIKA (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER MBUSI QWABE

Second Respondent

JOHAN HERMAN ROOLVINK

Third Respondent

Heard: 13 December 2013

Delivered: 6 May 2014

Summary: Review of jurisdictional ruling – Commissioner correctly ruling that CCMA has jurisdiction even though the workplace was outside the territorial boundaries of South Africa – Court interpreting “right not to be unfairly dismissed” purposively.

JUDGMENT

PATHER, AJ

Introduction

- [1] This is an application for condonation of the late filing of a review application and an application to review a jurisdictional ruling made by the second respondent (Commissioner) on 29 October 2012. The Commissioner had found that the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) had jurisdiction to determine the unfair dismissal dispute which the third respondent had referred to it, against the applicant.
- [2] The matter was unopposed.
- [3] The review application was filed approximately 2 days late. Given that the delay is not substantial, and that a proper case for condonation has been made out, condonation stands to be granted.

The background facts

- [4] The applicant administers construction companies that specifically perform extra-territorial assignments. These companies have contracts in the Democratic Republic of Congo (DRC) for the installation of production facilities for the copper industry. The applicant is an administration company registered in South Africa.
- [5] In terms of a contract signed on 6 June 2012, the applicant employed the third respondent:-
 - 5.1 to work in the DRC at its, the applicant's, Muni site; and
 - 5.2 specifically, for the purposes of extra-territorial work in that country.
- [6] On 17 August 2012, the third respondent was charged in the DRC, with misconduct. He was then suspended, repatriated to South Africa where a disciplinary hearing was held. The third respondent was subsequently dismissed in South Africa. He referred an unfair dismissal dispute against the applicant on 13 September 2012.

- [7] At the conciliation hearing held on 29 October 2012, the applicant's representative raised a preliminary point that the CCMA did not have jurisdiction to determine the dispute as the Labour Relations Act 66 of 1995 (Act) and the Basic Conditions of Employment Act did not apply to disputes outside of its territorial limits.

The jurisdictional ruling

- [8] After considering the arguments, the Commissioner issued the following ruling:-

'The applicant was issued with a South African contract in Durban to work at the Democratic Republic of Congo (DRC). During the course of his employment, he was suspended in DRC and was told to go back to South Africa. In South Africa, he was promised further employment but not at the same site in DRC. However, he was not placed at any site, but after a few days in South Africa, Durban, his services were terminated.

The respondent has referred me to various authorities, but those authorities are distinguishable. The dispute arose or the dismissal took place in Durban. In my opinion, South African laws should apply in dealing with this dispute.

Accordingly, the CCMA has jurisdiction to conciliate and arbitrate this dispute...'

- [9] The Commissioner dismissed the preliminary point. The applicant takes issue with the ruling and has brought this review application.

The grounds of review

- [10] It was submitted that in coming to the conclusion that he did, the Commissioner made a ruling which was not that of a reasonable and objective decision-maker, that he had failed to apply his mind, had misconducted himself, had committed a gross irregularity, or had exceeded his powers by acting unreasonably or unjustifiably.
- [11] It was also submitted that the Commissioner had failed to apply his mind to the legal authorities presented, in that it is the locality of the undertaking for

which the third respondent was employed which is the test in determining whether the CCMA has jurisdiction. Therefore, the Commissioner ought to have found that the CCMA did not have jurisdiction to arbitrate the dispute as the Labour Relations Act and the Basic Conditions of Employment Act have no extra-territorial application. In this regard, the Court was referred to the decisions in *Astral Operations Limited v Parry*¹ and *Genrec Mei (Pty) Limited v Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry and Others*².

Analysis of the argument

- [12] In comparing the facts of the *Genrec* case to those of *Astral v Parry*, Zondo JP, as he was then, remarked that it would be difficult to distinguish the cases. He stated that:-

‘In both cases the employer had a business operated from the Republic. In both cases the employee was or employees were resident in the Republic. In both cases, the employer had an operation outside South Africa. In both cases the employee or employees had entered into specific contracts of employment requiring them to work outside South Africa’.

- [13] In my view, the facts that the applicant is “merely an administration company”, registered and located in South Africa and “completely divorced from its DRC operations”, distinguish this case from the cases of *Genrec* and *Astral v Parry*. Despite the apparent contradiction contained in paragraph 11 of the founding affidavit of the Human Resources Director of the applicant, namely that the third respondent was employed to work in the DRC at the “Applicant’s” Mumi site, it is probable that the applicant has no operation of its own in the DRC, save that it administers construction companies based there.

- [14] The third respondent was employed in terms of a contract entered into in South Africa. While it is not clear whether he was dismissed following a disciplinary hearing as contended by the applicant or whether, as the Commissioner had stated in his ruling, his services had simply been

¹ (2008) 29 ILJ 2668 (LAC) at 2678H.

² (1995) 1 SA 563 (A)

terminated following an unfulfilled promise of further employment at a different site, the dismissal had occurred in South Africa. The only other information provided in respect of the third respondent's rights in terms of the contract is that:-

- 14.1 the contract commenced on 6 June 2012. The expiry date has not been stated, leading this court to conclude that it was open-ended; and
- 14.2 the South African Revenue Services' provisions in terms of Pay as You Earn (PAYE) taxes did not apply given that he was required to spend a total of 183 days per year out of South Africa.

No mention was made of the currency in which the third respondent's salary was paid. Neither was a copy of the contract submitted as part of the record.

- [15] In regard to the applicant, the Human Resources Director has not indicated the ambit of its administrative role in respect of DRC-based construction companies. However, it may be inferred that if the applicant employs personnel in South Africa for the purpose of extra-territorial work in the DRC, it, the applicant, is in some ways performing the function of labour brokering.
- [16] Mr Kirby-Hirst on behalf of the applicant referred to the presumption in South African law, that in the absence of a clearly expressed intention, Parliament does not design its statutes to operate on its subjects beyond the territorial limits of the country. This presumption however, has no application to this case, as will be seen.
- [17] Given that the contract was entered into in South Africa, the parties are based in this country, the applicant has no business interests or operation apart from administering construction companies in the DRC, a function which for all intents and purposes, could be performed in this country, and the third respondent was dismissed here in South Africa, the CCMA has jurisdiction to determine the alleged unfair dismissal dispute. It cannot be, that against the background of his constitutional right to fair labour practices and the legal principle that "for every right there is a remedy", the third respondent must travel to the DRC in order to enforce his right not to be unfairly dismissed. In

Workplace Law (ninth edition), Juta, at paragraph 8, page 13, John Grogan, quoting also from Brassey 'The Common Law Right to a Hearing Before Dismissal'³, states the following:

'The general guarantee of fair labour practices has far-reaching effects on the civil courts' approach to the interpretation of the rights of parties to employment contracts. All courts are enjoined when applying and developing the common law to have 'due regard to the spirit, purport and objects of the Bill of Rights'. Since these are expressed as embodying 'the values which underlie an open and democratic society based on human dignity, equality and freedom', the development of the common law in the light of Chapter 2 calls for reconsideration of some of the assumptions underlying the common law contract of employment, in particular the employer's power of command and unfettered rights in respect of promotion and dismissal'.

- [18] Furthermore, the DRC has been much in the news for all the wrong reasons. This Court can therefore take judicial notice of the fact that the Rule of Law in that country may be undermined by the ongoing civil strife being experienced in several parts of the DRC. According to British historian Dan Snow, writing on the BBC News website, in an article titled "*D R Congo: Cursed by it natural wealth*"⁴ :-

'The Portuguese, Belgians, Mobutu and the present government have all deliberately stifled the development of a strong state, army, judiciary and education system, because it interferes with their primary focus, making money from what lies under the Earth'.

- [19] In the circumstances, although no reason for his pronouncement was given, the Commissioner correctly concluded that the cases of *Genrec* and *Astral Operations v Parry* were distinguishable and that accordingly the CCMA has jurisdiction to conciliate and arbitrate the third respondent's dispute.

³ (1993) 9 SAJHR 177

⁴ (9 October 2013)

Order

[16] For these reasons, I order that:-

1. the application for review is dismissed; and
2. there is no order as to costs.

Pather, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Macgregor Erasmus

Mr Kirby-Hirst

For the Respondent: No appearance